RECORD AND BRIEFS

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No. 16-961

IN THE
Supreme Court of the United States

NICOLE A. DALMAZZI,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

SUPPLEMENTAL BRIEF OF THE PETITIONER

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February 24, 2017

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SUPPLEMENTAL BRIEF

Pursuant to Rule 15.8, Petitioner files this brief to apprise the Court of two relevant developments subsequent to the filing of the Petition.

1. On February 9, 2017 (two days after argument), the U.S. Court of Appeals for the Armed Forces (CAAF) issued a summary "order and judgment" in *United States* v. *Ortiz*, No. 16-671 (C.A.A.F. Feb. 9, 2017) (mem.), a case in which CAAF had granted review on issues materially similar to the second and third questions presented here. *See United States* v. *Ortiz*, 75 M.J. 473 (C.A.A.F. 2016) (granting review).[1] The *Ortiz* order provided only that "the decision of the Air Force Court of Criminal Appeals is hereby affirmed," and that "[t]he opinion of the Court will be issued on a future date." *Ortiz*, No. 16-671, at 1.

2. Four days later, on February 13, 2017, CAAF appeared to confirm that, whatever it had decided in *Ortiz*, that decision necessarily settled the merits of the second and third questions presented in this case. Thus, in *United States* v. *Buford*, No. 16-689 (C.A.A.F. Feb. 13, 2017) (mem.),[2] a case in which CAAF had also granted review on the same merits questions as those presented here, the Court of Appeals held that "the

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1. The issues on which CAAF granted review were "whether United States Court of Military Commission Review [(CMCR)] Judge, Martin T. Mitchell, is statutorily authorized to sit as one of the Air Force Court of Criminal Appeals [(CCA)] judges on the panel that decided appellant's case," and "whether Judge Martin T. Mitchell's service on both the Air Force [CCA] and the [CMCR] violates the Appointments Clause given his status as a [principal] officer on the [CMCR]." *Ortiz*, 75 M.J. at 472.

2. Copies of CAAF's orders in *Ortiz* and *Buford* have been appended to this brief.

granted assigned issues are without merit in view of our holding in *United States v. Ortiz* . . . ." *Id.* at 1.

Between them, *Buford* and *Ortiz* make clear that CAAF has not only now answered the second and third questions presented, but that it has done so in a manner adverse to Petitioner—holding that it violates neither 10 U.S.C. § 973(b)(2)(A)(ii) nor the Appointments Clause for active-duty military officers like Judge Mitchell to continue to serve on Courts of Criminal Appeals while also serving as "additional judges" of the U.S. Court of Military Commission Review (CMCR) under 10 U.S.C. § 950f(b)(3).

* * *

The Petition in this case urged the Court to grant plenary review on all three of the questions presented, even though, at the time it was filed, CAAF had not yet answered two of them. *See* Pet. 13–18. As the Petition argued, if § 973(b)(2)(A)(ii) were construed *not* to prohibit Judge Mitchell's appointment as an "additional judge" of the CMCR, that conclusion would raise constitutional questions of the first order—with implications for over 100 pending cases in the lower military courts (and more by the day). *See* Pet. 15–17.[3]

Although this Court's intervention was imperative even *before* CAAF reached the merits of the dual-officeholding questions presented in these cases, CAAF's apparent (if unorthodox) resolution of those merits has only bolstered the need for—and appropriateness of—plenary review here (and now).

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3. This Court has now received a petition for a writ of certiorari in six additional cases raising the same questions as those presented here. *See* Petition for a Writ of Certiorari, *Cox* v. *United States*, No. 16-__ (U.S. filed Feb. 21, 2017).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX TO THE SUPPLEMENTAL BRIEF

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United States Court of Appeals
for the Armed Forces
Washington, D.C.

United States, Appellee v. Keanu D.W. Ortiz, Appellant	USCA Dkt. No. 16-0671/AF Crim.App. No. 38839 ORDER AND JUDGMENT

On consideration of the briefs of the parties, the briefs of *amici curiae*, and oral argument, it is, by the Court, this 9th day of February, 2017,

ORDERED:

That the decision of the United States Air Force Court of Criminal Appeals is hereby affirmed. The opinion of the Court will be issued on a future date. C.A.A.F. R. 43(b). A petition for reconsideration may be filed no later than 10 days after the date of the issuance of said opinion.

For the Court,
/s/ William A. DeCicco
Clerk of the Court

United States Court of Appeals
for the Armed Forces
Washington, D.C.

United States, Appellee v. Charles D. Buford, Appellant	USCA Dkt. No. 16-0689/AF Crim.App. No. 2016-04 ORDER

On further consideration of the petition for grant of review of the decision of the United States Air Force Court of Criminal Appeals on appeal by the United States under Article 62, Uniform Code of Military Justice, 10 U.S.C. § 862, and the granted specified issue, it is noted that the court below has neither affirmed nor reversed the ruling of the military judge and instead has vacated the ruling at the court-martial and remanded the case to the military judge. There is, at present, no extant ruling which excludes evidence, and if the ruling below is effectuated, the judgment of the Court of Criminal Appeals would resume, not terminate, the proceedings. Additionally, the granted assigned issues are without merit in view of our holding in *United States v. Ortiz*, __ M.J. __ (C.A.A.F. 2017). Accordingly, it is, by the Court, this 13th day of February, 2017,

ORDERED:

That the order granting the petition for grant of review is hereby vacated and the case is returned to

the Judge Advocate General of the Air Force for execution of the remand and further consideration ordered by the Court of Criminal Appeals in accordance with *United States v. Kosek*, 41 M.J. 60, 64-65 (C.M.A. 1994).

For the Court,
/s/ William A. DeCicco
Clerk of the Court